(4) (2)

Nos. 92-1066 & 92-1157

Supreme Court, U.S.
FILED
JAN 14 1993
THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

EDWIN W. EDWARDS, GOVERNOR OF THE STATE OF LOUISIANA, et al,
Petitioners

v.

SOJOURNER T., et al,
Respondents

and

HARRY CONNICK, SR., DISTRICT ATTORNEY FOR THE PARISH OF ORLEANS, et al,
Petitioners

v.

DR. IFEANYI CHARLES OKPALOBI,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF RESPONDENT, DR. IFEANYI CHARLES OKALOBI IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Sidney Mayer Bach
Counsel of Record
Bach & Wasserman
6th Floor - Lakeway II
3850 North Causeway Boulevard
Metairie, Louisiana 70002
(504) 836-7300

Counsel for Respondent
Dr. Ifeanyi Charles Okpalobi

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

1 pp

QUESTIONS PRESENTED

1. Are there compelling constitutional reasons for the Court to re-visit *Roe v. Wade* and its most recent progeny, *Planned Parenthood v. Casey*?

2. Is access to an abortion a right, privilege or guarantee that can be legitimately extrapolated from the Constitution?

3, If not, is Louisiana's anti-abortion criminal statute constitutionally flawed or legally defective in any other respects?

STATUTORY AND CONSTITUTIONAL PROVISIONS

The challenged legislation is Act 26 of the 1991 Regular Session of the Louisiana Legislature relative to abortion. The text appears as "Appendix D" at p. A-19 of the Petition filed herein on behalf of Edwin W. Edwards, Governor of the State of Louisiana and Richard P. Ieyoub, Attorney General of the State of Louisiana (the "Edwards Petition").

The relevant provisions of the Constitution of the United States applicable to the issues presented are:

A. Amendment X, and

B. Amendment XIV, the "due process" clause.

The relevant provision of the Louisiana Constitution of 1974 is Article I, Section 5 which specifically guarantees a "right of privacy" to all persons.

STATEMENT OF THE CASE

Except for the conclusions of law asserted in footnote 2 at p. 3 of the Edwards Petition, and the present tense of the assertion at p. 5 thereof that "Plaintiff Sojourner T. is pregnant," Respondent adopts by reference Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

There are at least two basic arguments on the issue of whether to grant or deny a writ of certiorari in this case.

1. *AGAINST*

Since just recently within the past year the Justices of this Court have labored and wrestled mightily with the abortion issue, it would appear unlikely that the Court will now either re-align itself and/or issue new and different pronouncements than those so extensively expressed and forcefully asserted in *Planned Parenthood v. Casey*, 505 U.S. ____, 112 S.Ct 2791, 120 L.Ed.2d 674 (1992). Thus, realistic expectations, coupled with the concept of "judicial economy," suggest that the Court will choose not to revisit *Roe v. Wade*, 410 U.S. 113, 93 S.Ct 705, 35 L.Ed.2d 147 (1973) and its progeny at this time.

2. *FOR*

Since we look to the Supreme Court for constitutional interpretation and guidance, the Chief Justice's uncontradicted acknowledgment in *Casey, supra*, as to "the confused state of this Court's abortion jurisprudence"[1] weighs strongly in favor of granting review at this time because of the multitude of uncertainties that still abound on the subject. All yearn for the issue to be resolved with a greater degree of certainty and within the constitutional framework of our republican form of government.

ARGUMENT

Because the *Casey* decision is so fresh in the Court's jurisprudence (June 29, 1992), any expectations that the several Justices will change their respective views and/or re-align themselves on the core constitutional issues

---

[1] 112 S.Ct 2791 (1992) at 2855
120 L.Ed.2d 674 at 759

presented would now appear to be unrealistic. Unless such a presumption is unwarranted, it would appear to be in the best interests of judicial economy not to further agitate the issue at this time by the granting of a writ of certiorari in this case.

However, if there is even the slightest chance that some reconsideration of the fundamental underlying issue of constitutional construction could be forthcoming at this time, we would then earnestly contend as follows:

The District Court and the Court of Appeals below acknowledged their constitutional obligation to follow and apply this Court's prior pronouncements on the abortion issue as enunciated in *Roe v. Wade* and its progeny.

However, with the Louisiana litigants now at the Court's front door, this case assumes a greater and more compelling constitutional dimension. At this level, it presents the Court with an opportunity to effectively address a fundamental overriding constitutional issue which could well overshadow the various parties' legitimate, heartfelt and forcefully articulated interests in the national debate on abortion. This case, without reservation, squarely raises the fundamental issue of federalism, the resolution of which, at this juncture in our Nation's constitutional history, could have a lodestar influence upon American constitutional construction well into the 21st Century.

This case challenges the Court to candidly confront and decisively resolve the issue of whether the Constitution provides a privacy right of such breadth and scope as to pre-empt, with or without limitation, all state-legislated prohibitions against the act of abortion. The plurality in *Casey, supra*, seems to suggest that access to abortion is

not an "absolute" constitutional right, but rather a "conditional" one with sprinklings of legitimate state interests in the regulation of the activity. This compromise approach may well have been formulated with the best and most honorable of intentions, but its potential for creating and perpetuating confusion and uncertainty does not judicially or practically serve the citizenry well.

The issue to be resolved here really isn't Louisiana's abortion statute; for whether the Court chooses to grant or to deny review in this case, that statute is legally doomed. Its demise and ultimate legal burial will result from any one of the following:

i. denial of the request for writ of certiorari in this case,

ii. the unconstitutionally-elusive vagueness of the various exception provisions of this criminal statute which then causes the statute to outlaw all abortions,

iii. the application of the 1974 Louisiana Constitution's clear, absolute and specific guarantee of the "right to privacy":

> "Every person shall be secure in his person ... against unreasonable invasions of privacy." *Louisiana Constitution of 1974*, Article I, Section 5.

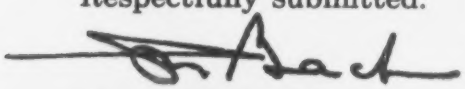
The petitioners here urge consideration of a facial challenge to the statute. But before engaging in that exercise, the Court should first determine whether, with the dawn of the 21st Century now approaching, it is willing to directly confront and decisively resolve the vital

constitutional issue of federalism raised by this case, i.e., whether, through judicial construction, the Constitution should be expanded to questionably permissive reaches for the purpose of resolving issues which the American people, under their republican form of government, are entitled and capable of resolving, within recognized constitutional limitations, through their respective elected state and/or federal legislative representatives.

CONCLUSION

If the Court is ready and willing to address that important and fundamental issue, then respondent would have no opposition to the granting of the writ of certiorari requested by petitioners in this case. Otherwise, the request for writ should be denied.

Respectfully submitted:



Sidney Mayer Bach
Counsel of Record
Bach & Wasserman
6th Floor - Lakeway II
3850 North Causeway Boulevard
Metairie, La. 70002
(504) 836-7300

Counsel for Respondent
Dr. Ifeanyi Charles Okpalobi